A

DATUK M KAYVEAS

v.

SEE HONG CHEN & SONS SDN BHD & ORS

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02-10-2012(W)]
15 JANUARY 2013

D ***CIVIL PROCEDURE:*** *Appeal - Appeal to Court of Appeal - Interference with part of judgment of High Court not forming subject of appeal - Whether unjustified - Attributing to High Court's finding of fact which did not exist in grounds of judgment - Whether injustice caused to appellant - Whether appeal to be allowed*

E ***TRUSTS:*** *Breach of trust - Bare and constructive trust - Holding of company shares on trust until loan paid in full - Trustee disposing of shares to third party before full payment made - Whether trustee in breach of trust - Whether conduct unconscionable - Whether constructive trust created when shares transferred out to third party*

F The appellant/plaintiff, who appeared in a representative capacity for a political party ('PPP'), had incorporated the fifth defendant company to function as PPP's investment arm. Sometime in 2003, the appellant made a successful bid for an auctioned property and paid a 10% deposit for the same. To complete the payment, the G appellant obtained a friendly loan of about RM2.4 million from the first defendant and paid the full purchase price of the property through the fifth defendant, who became the registered proprietor of the property. The facts showed that, as security for the loan, the appellant transferred the shares in the fifth defendant to the H first defendant on trust, until the full payment of the loan. However, notwithstanding his position as a mere trustee, the first defendant thereafter increased the fifth defendant's shares from two to 100,000, allotted 99,998 of the shares to himself and the balance two to his nominees, the second and third defendants, I and appointed the latter parties as directors of the fifth defendant.

Further, in November 2005, the first defendant, together with the second and third defendants, disposed the fifth defendant's shares to the fourth defendant for a purported consideration of RM2.5 million. Soon thereafter, the fourth defendant, exercising its right as the new owner of the fifth defendant, allotted two of the latter's 100,000 shares to the sixth and seventh defendants respectively. Further, in July 2008, the fourth defendant, seeking to oust the appellant from the property, commenced a trespass action against the latter. The appellant alleged that the first defendant was in breach of the trust when he transferred the fifth defendant's shares to the fourth defendant, and that the sale of the shares to the fourth defendant thereof was void, and in the circumstances, applied to the High Court, *inter alia,* for declarations to the effect. The learned High Court Judge, in finding for the appellant against all the seven defendants, and granting the declarations sought (the first defendant did not defend the action), ruled that: (i) a trust was created when the appellant transferred the shares of the fifth defendant to the first defendant; (ii) that the trust had transformed into a constructive trust when the first defendant had unconscionably transferred them to the fourth defendant who had notice of the trust; and (iii) such a constructive trust was equally applicable to the fourth, fifth, sixth and seventh defendants ('the collective respondents'). The collective respondents appealed against the decision wherefore the Court of Appeal allowed the appeal and set aside the orders of the High Court. *Inter alia*, it was the Court of Appeal's view that no express trust existed in 2003 by way of transfer of the two shares in the fifth defendant to the first defendant, and therefore, since the appellant's pleaded case was essentially premised on the existence of an express trust, the appellant's case must on that score necessarily fail. The appellant averred that the Court of Appeal was wrong in adverting to express trust the way it did, as the matter of the existence or otherwise of an express trust was never an issue before that court, nor was it ever being pleaded by him. Hence, the appellant applied for and having obtained leave to appeal, posed the following three questions for the determination of the Federal Court, namely: (i) whether the Court of Appeal, in determining the appeal before it, had the jurisdiction to interfere with a part of the judgment of the learned judge not forming the subject of the appeal; (ii) whether when a moveable property that was held on trust is disposed to a third party in

breach of the trust, the said third party is entitled to title thereof if it was a *bona fide* purchaser for value without notice; and (iii) whether it is incumbent for such third party *bona fide* purchaser for value without notice to establish that consideration had in fact moved from him to the vendor.

Held (allowing appeal; answering question (i) in the negative)

Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) There was nothing in the appellant's statement of claim to indicate that the appellant had pleaded "express trust". The statement of claim, on the other hand, merely states "trust". This aside, the finding by the Court of Appeal that the learned judge had made a finding of the existence of an express trust, and that the first defendant was the express trustee of the entire 100,000 shares, was also erroneous. There was nothing in the learned judge's grounds of judgment that indicated a finding of fact or law that the first defendant was the express trustee of the shares. (paras 23, 25 & 26)

(2) A perusal of the memorandum of appeal regarding the trust showed that it pertained more to the dissatisfaction of want of evidence that the first, second and third defendants "were holding the shares on trust for the respondent …". Further, going by ground 13 of the memorandum, even the collective respondents conceded that they were found to be constructive trustees by the learned judge – and not trustees of an express trust. The Court of Appeal in deciding the way it did had thus gone outside the four corners of the memorandum of appeal. (para 24)

(3) The first defendant was merely instructed to hold on to the shares pending the full repayment of the loan, and was never granted the power of disposal by the appellant of those shares. Once payment was completed, the shares were to be returned. From these simple facts, it was obvious that at the initial stage only a bare trust existed as the first defendant had no active duty to perform. (para 38)

(4) The High Court had before it positive and unrebutted evidence from the appellant of the existence of a trust. Unless this positive testimony, which went through the rigours of a trial, is contradicted, the failure to do so must mean that the

appellant's evidence had been successfully established, or taken as admitted by the opposing party. The learned judge was therefore right in concluding that the first defendant was entrusted with those shares. (paras 27 & 30)

(5) It was improbable that full repayment to the first defendant would not have taken place as gleaned from the facts. The appellant was an established body and was housed on that property. A sum of RM1.8 million had already been paid enforcing the certainty of the fulfillment of the appellant's obligation towards full payment of the loan. The instruction to hold it on trust and not to dispose the shares was made crystal clear by the appellant to the first defendant, and it was obvious that factually and legally the appellant never abandoned its beneficial interest. The first defendant had thus acted unconscionably when he transferred the shares to the fourth defendant. At the instance when the wrongful act was committed by the first defendant, a constructive trust came into existence. (para 39)

(6) There was no evidence adduced by the collective respondents to show that monies had been paid to the first, second and third defendants for the shares of the fifth defendant. In fact, there was corroboration of non-payment when the second and third defendants, who were directors of the fifth defendant, evinced that they did not receive any money for the transfer of their shares to the fourth defendant. Questions also arose as to why the transfer of shares forms record the consideration to be RM100,000 and not RM2.5 million and why the purchase price was less than the auctioned price of the property. All the answers were within the knowledge of the collective respondents but none were forthcoming. From the facts, questions posed but left unanswered, want of evidence of payment by the fourth defendant, questionable documentary evidence, unrebutted evidence of the appellant, and conduct of the parties, it is clear that the fourth defendant was not a *bona fide* purchaser of the fifth defendant's shares from the first defendant. (paras 41-44)

(7) On the overwhelming evidence before the court, the court was convinced that the shares of the fifth defendant had been transferred by the appellant in 2003 to the first defendant on trust. The latter being bereft of any title or interest could not transfer the shares to anyone, and a constructive trust came

into existence the moment the shares were transferred to the collective respondents who had notice of the trust. It ought also to be noted that although the collective respondents purchased the shares from the first defendant, and not from the appellant, the hurdle of privity of contract could be overcome by enforcing equity on the former, in the light of them having notice of the creation of the trust. (paras 45 & 46)

(8) No jurisdictional error was committed by the learned judge in the instant case as would justify the Court of Appeal to interfere or act to straighten things out. Further, in the course of the unnecessary interference of a part of the judgment that did not form part of the appeal, and due to misreading of the grounds of judgment, the Court of Appeal had instead caused injustice to the appellant. In the circumstances, the answer to the first question is in the negative, and that being the case, there is no necessity to answer questions (ii) and (iii). (para 51)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif, yang hadir dalam kapasiti representatif kepada sebuah parti politik ('PPP'), telah memperbadankan syarikat defendan kelima sebagai syarikat pelaburan PPP. Pada tahun 2003, perayu berjaya membida suatu hartanah yang dilelong dan telah membayar deposit 10%. Bagi menyempurnakan bayaran, perayu mendapatkan pinjaman persahabatan berjumlah lebih kurang RM2.4 juta daripada defendan pertama, dan seterusnya membayar sepenuhnya harga belian melalui defendan kelima yang menjadi pemilik berdaftar hartanah tersebut. Fakta menunjukkan bahawa, sebagai jaminan kepada pinjaman, perayu telah memindahkan saham-saham defendan kelima kepada defendan pertama sebagai amanah sehingga pinjaman dibayar sepenuhnya. Walau bagaimanapun, defendan pertama, tanpa mengira kedudukannya sebagai pemegang amanah, kemudian bertindak menambah jumlah saham defendan kelima daripada dua kepada 100,000, mengagihkan 99,998 dari saham tersebut kepada beliau dan dua saham selebihnya kepada nomini-nomininya, iaitu defendan-defendan kedua dan ketiga, serta melantik kedua-dua pihak terkemudian tersebut sebagai pengarah defendan kelima. Selain itu, pada bulan November 2005, defendan pertama, bersama-sama dengan defendan-defendan kedua dan ketiga, telah melupuskan saham-saham defendan kelima kepada defendan keempat untuk balasan

sebanyak RM2.5 juta. Berikutan itu, defendan keempat, dengan menggunakan kuasanya sebagai pemilik baru defendan kelima, mengagihkan dua daripada 100,000 saham defendan kelima kepada defendan-defendan keenam dan ketujuh. Selanjutnya, pada bulan Julai 2008, defendan keempat, dengan hasrat untuk mengeluarkan perayu dari hartanah, telah memulakan guaman terhadap perayu kerana menceroboh. Perayu mengatakan bahawa defendan pertama telah memungkiri amanahnya apabila memindahkan saham-saham defendan kelima kepada defendan keempat, dan bahawa penjualan saham kepada defendan keempat tersebut adalah tak sah, dan dalam keadaan tersebut memohon, antara lain, deklarasi-deklarasi yang sekadarnya kepada Mahkamah Tinggi. Yang arif hakim Mahkamah Tinggi, dalam membuat dapatan yang memihak kepada perayu terhadap ketujuh-tujuh defendan, dan membenarkan deklarasi yang dipohon (defendan pertama tidak mempertahankan guaman), memutuskan bahawa (i) suatu amanah telah berbangkit apabila perayu memindahkan saham-saham defendan kelima kepada defendan pertama; (ii) bahawa amanah telah bertukar menjadi amanah konstruktif apabila defendan pertama dengan secara tidak patut memindahkan saham-saham tersebut kepada defendan keempat yang mengetahui tentang amanah; dan (iii) amanah konstruktif sedemikian terpakai sama rata kepada defendan-defendan keempat, kelima, keenam dan ketujuh ('kumpulan responden-responden'). Kumpulan responden-responden telah merayu di mana Mahkamah Rayuan membenarkan rayuan dan mengenepikan perintah-perintah yang dibuat oleh Mahkamah Tinggi. Antara lain, menjadi dapatan Mahkamah Rayuan bahawa tiada amanah ekspres wujud pada tahun 2003 melalui pemindahan dua saham defendan kelima kepada defendan pertama, dan dengan itu, oleh sebab kes yang diplidkan perayu bergantung kuat kepada kewujudan suatu amanah ekpres, maka kes perayu berdasarkan perkara itu seharusnya gagal. Perayu berhujah bahawa Mahkamah Rayuan khilaf bilamana mengungkit persoalan amanah ekspres seperti yang dilakukannya, memandangkan kewujudan atau ketidakwujudan suatu amanah ekspres tidak pernah menjadi isu di hadapan mahkamah tersebut, dan tidak pernah diplid oleh beliau. Apapun, perayu telah memohon, dan setelah mendapat kebenaran untuk merayu, mengemukakan tiga persoalan berikut untuk pertimbangan dan pemutusan Mahkamah Persekutuan, iaitu: (i) sama ada Mahkamah Rayuan, dalam memutuskan rayuan di hadapannya, mempunyai bidang kuasa untuk mengganggu satu bahagian penghakiman yang arif hakim yang tidak menjadi hal perkata rayuan; (ii) sama ada di mana suatu harta tak alih yang

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dipegang atas amanah telah dilupuskan kepada pihak ketiga secara yang melanggar amanah, pihak ketiga tersebut berhak kepada hak milik harta tersebut jika ia seorang pembeli suci hati untuk nilai tanpa notis; dan (iii) sama ada menjadi kewajipan pembeli suci hati untuk nilai tanpa notis sedemikian untuk membuktikan bahawa balasan telah sebenarnya bertukar tangan antara beliau dan penjual.

Diputuskan (membenarkan rayuan; menjawab soalan (i) secara negatif)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Tiada apapun dalam pernyataan tuntutan perayu yang menunjukkan bahawa perayu telah memplid "amanah ekspres". Pernyataan tuntutan sebaliknya hanya menyatakan "amanah". Selain itu, dapatan Mahkamah Rayuan bahawa yang arif hakim telah membuat dapatan mengenai kewujudan suatu amanah ekspres, dan bahawa defendan pertama adalah pemegang amanah ekspres bagi kesemua 100,000 saham, juga adalah khilaf. Tiada apapun dalam alasan penghakiman yang arif hakim yang menunjukkan dapatan fakta atau undang-undang bahawa defendan pertama adalah seorang pemegang amanah ekspres bagi saham-saham.

(2) Penelitian terhadap kandungan memorandum rayuan mengenai amanah menunjukkan bahawa ia lebih berkaitan dengan ketidakpuasan kerana ketiadaan keterangan yang menunjukkan defendan-defendan pertama, kedua dan ketiga "memegang saham-saham atas amanah bagi pihak responden ...". Selain itu, berdasarkan alasan 13 memorandum, kumpulan responden-responden sendiri mengakui bahawa mereka telah didapati sebagai pemegang amanah konstruktif oleh yang arif hakim – dan bukannya pemegang amanah suatu amanah ekspres. Mahkamah Rayuan dalam memutuskan secara yang dibuatnya jelas telah terkeluar dari keempat-empat penjuru memorandum rayuan.

(3) Defendan pertama hanya diarahkan untuk memegang saham-saham sementara menunggu pembayaran sepenuhnya pinjaman, dan tidak pernah diberikan kuasa untuk menjual saham-saham tersebut oleh perayu. Sebaik pembayaran balik dibuat, saham-saham hendaklah dikembalikan. Daripada fakta-

fakta asas ini, adalah jelas bahawa di peringkat awal, hanya wujud suatu "bare trust" memandangkan defendan pertama tiada tanggungjawab aktif untuk dilaksanakan. A

(4) Mahkamah Tinggi mempunyai keterangan-keterangan perayu yang positif dan tidak disangkal di hadapannya mengenai kewujudan suatu amanah. Kecuali jika testimoni positif ini, yang melalui keketatan perbicaraan, disangkal, maka kegagalan berbuat demikian bermakna bahawa keterangan perayu telah berjaya dibuktikan, atau dianggap sebagai diakui oleh pihak lawan. Yang arif hakim dengan itu betul dalam merumuskan bahawa defendan pertama telah diamanahkan dengan saham-saham tersebut. B C

(5) Berdasarkan fakta, adalah tidak mungkin bahawa pembayaran penuh kepada defendan pertama tidak berlaku. Perayu adalah suatu badan yang sudah lama wujud dan menjadikan hartanah tersebut sebagai markasnya. Sejumlah RM1.8 juta sudahpun dibayar sekaligus memastikan penyempurnaan obligasi perayu terhadap pembayaran penuh pinjaman. Arahan untuk memegang saham-saham atas amanah dan tidak melupuskannya telah diperjelaskan oleh perayu kepada defendan pertama, dan adalah nyata bahawa di sisi fakta dan undang-undang, perayu tidak pernah meninggalkan kepentingan benefisialnya. Defendan pertama, dengan itu, telah bertindak secara tidak berhati perut apabila memindahkan saham-saham kepada defendan keempat. Sebaik sahaja tindakan salah tersebut dilakukan oleh defendan pertama, suatu amanah konstruktif telah wujud. D E F

(6) Tiada keterangan dikemukakan oleh kumpulan responden-responden bagi menunjukkan bahawa wang telah dibayar kepada defendan-defendan pertama, kedua dan ketiga untuk saham-saham defendan kelima. Malah, terdapat koroborasi mengenai ketiadaan bayaran apabila defendan-defendan kedua dan ketiga, yang merupakan pengarah-pengarah defendan kelima, mengatakan bahawa mereka tidak menerima sebarang bayaran bagi pemindahan saham-saham mereka kepada defendan keempat. Persoalan juga berbangkit mengenai kenapa borang pemindahan saham merekodkan balasan sebagai RM100,000 dan bukannya RM2.5 juta, dan kenapa harga belian kurang daripada nilai lelongan hartanah. Kesemua jawapan kepada persoalan-persoalan ini adalah G H I

dalam pengetahuan kumpulan responden-responden, namun tiada jawapan baginya telah diberikan. Berdasarkan fakta, soalan-soalan yang tidak berjawab, ketiadan keterangan mengenai pembayaran oleh defendan keempat, keterangan-keterangan dokumentari yang boleh dipersoalkan, keterangan perayu yang tidak disangkal serta kelakuan pihak-pihak, adalah jelas bahawa defendan keempat bukanlah seorang pembeli suci hati saham-saham defendan kelima daripada defendan pertama.

(7) Berdasarkan keterangan yang banyak di hadapan mahkamah, mahkamah yakin bahawa saham-saham defendan kelima telah dipindahkan oleh perayu pada tahun 2003 kepada defendan pertama berasaskan amanah. Pihak terkemudian, yang tiada hak milik atau kepentingan ke atas saham-saham, tidak boleh memindahkannya kepada sesiapa dan suatu amanah konstruktif wujud sebaik sahaja saham-saham tersebut dipindahkan kepada kumpulan responden-responden yang mempunyai notis mengenai amanah. Harus juga diingati bahawa walaupun kumpulan responden-responden membeli saham-saham daripada defendan pertama, dan bukannya daripada perayu, halangan priviti kontrak boleh diatasi dengan cara melaksanakan ekuiti terhadap pihak terdahulu, memandangkan mereka mempunyai notis mengenai kewujudan amanah.

(8) Tiada kekhilafan bidang kuasa telah dilakukan oleh yang arif hakim dalam kes ini sehingga mewajarkan campur tangan Mahkamah Rayuan atau bertindak untuk membetulkan keadaan. Selain itu, dalam melakukan campur tangan yang tidak perlu ke atas satu bahagian penghakiman yang tidak menjadi sebahagian daripada rayuan, dan menyalahtafsir alasan penghakiman, Mahkamah Rayuan telah sebaliknya menyebabkan ketidakadilan kepada perayu. Oleh hal yang demikian, jawapan kepada persoalan pertama adalah berbentuk negatif, dan ini bermakna tiada lagi keperluan untuk menjawab soalan-soalan (ii) dan (iii).

Case(s) referred to:

Bar Malaysia v. HF Vitality (Malaysia) Sdn Bhd [2003] 1 CLJ 510 HC ***(refd)***

Berry v. British Transport Commission [1961] 3 All ER 65 ***(refd)***

Christie v. Ovington [1875] 1 Ch D 279 ***(refd)***

De Mattos v. Gibson (1843-60) All ER Rep 803 ***(refd)***

Foskett v. McKeown & Anor [2000] 3 All ER 97 ***(refd)***

Gissing v. Gissing [1970] 2 All ER 780 ***(refd)***
Hussey v. Palmer [1972] 3 All ER 744 ***(refd)***
Lord Strathcona SS Co v. Dominion Coal Co [1926] AC 108 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Paragon Finance Plc v. DB Thakerar & Co [1999] 1 All ER 400 ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Chin Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Re Cunningham and Frayling [1891] 2 Ch 567 ***(refd)***
Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tulk v. Moxhay 1848 EWHC Ch J34 ***(refd)***
Westdeuthsche Landesbank Gironzentrale v. Islington London Borough Council [1996] 2 All ER 961 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 67, 68, 96

Other source(s) referred to:
Geraint Thomas, *The Law of Trust,* 2nd edn, p 22
Halsbury's Laws of England, 4th edn, vol 48
Underhill's Law of Trusts and Trustees, 12th edn, p 10

For the appellant - Malik Imtiaz Sarwar (M Menon & V Mugunthan with him); M/s Jaffar Menon
For the respondents - Harpal Singh Grewal (Joseph Yeo, Paari Perumal & Reny Rao with him); M/s Joseph Yeo

[Editor's note: For the Court of Appeal judgment, please see See Hong Chen & Sons Sdn Bhd & Ors v. M Kayveas [2011] 1 LNS 1732.]

Reported by Wan Sharif Ahmad

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] For ease of reference, the plaintiff who is intituled in the statement of claim as Datuk M. Kayveas though on a representative capacity shall be referred to as the appellant. Parties agree that the actual appellant is a political party ie, the People's Progressive Party of Malaysia (PPP). The first, second, and third defendants will be referred to in their respective original nomenclature as they never filed any appeal at any stage of the way. The fourth, fifth, sixth, and seventh defendants (who are in the one camp), being

A the relevant respondents in this appeal, will be referred to collectively as the 'collective respondents'. Whenever necessary the specific persons will be referred to in their respective specific titles.

[2] The appellant filed an action against seven defendants and
B was successful at the High Court after a lengthy hearing. Being dissatisfied, only the collective respondents filed an appeal at the Court of Appeal. They succeeded and the High Court order was accordingly set aside. The next phase saw the appellant successfully obtaining leave to file an appeal against the decision
C of the Court of Appeal of 23 August 2011 and hence the matter before us.

[3] Leave was obtained pursuant to s. 96 of the Courts of Judicature Act 1964 to determine these questions, namely:

D (i) whether the Court of Appeal has the jurisdiction and/or power under ss. 67 and 68 of the Courts of Judicature Act 1964 to interfere with a part of the judgment of the learned judge not forming the subject of an appeal in determining the appeal before it;

E (ii) where moveable property is held on trust and disposed to a third party in breach of the said trust, whether the said third party is entitled in law to claim title to such property where it is a *bona fide* purchaser for value without notice; and

F (iii) whether it is incumbent upon a party claiming to be a *bona fide* purchaser for value of immoveable property without notice to establish as a threshold requirement that consideration had in fact moved from the third party to the vendor.

G **[4]** To appreciate the matter before us, it will not be inappropriate at the outset to state that the first defendant who is an important player in this case, has shown no interest in the outcome of the case at any stage of the way, even up to the current stage. He simply refused to defend his position or come
H forward to adduce evidence when subpoenaed by both parties. The second and third defendants being nominees of the first defendant likewise failed to file any appeal at the Court of Appeal, thus leaving only the 'collective respondents' to contest the appeal. As the fourth defendant is the *alter ego* of the fifth defendant (a
I company), and the sixth and seventh being his nominees, the fourth defendant's evidence will equally be applicable to them.

Facts Of The Case

[5] Being interested in an auctioned piece of property known as Grant No. 27024 Lot 522 of Section 69, in Kuala Lumpur, Wilayah Persekutuan ('the property'), and in which the appellant was housed since 1998, the appellant made a successful bid for it on 28 August 2003. A 10% deposit of the reserve price fixed at RM2,673,000 was paid by the appellant from its own funds through the fifth defendant. The fifth defendant which was incorporated as the investment arm of the appellant was the entity to hold the property. As far as the appellant was concerned, as there were only two subscriber shares in the fifth defendant and the appellant controlled them, not only did he own the company but would also have direct beneficial interest over the property.

[6] To complete the payment of the successful bid and in order to finance the purchase of the property, the appellant obtained a friendly loan of RM2,405,700 from the first defendant. On 26 December 2003 the balance purchase price of RM2,405,700 was paid to the Assistant Registrar at the Kuala Lumpur High Court financed adequately by that loan. The payment was similarly made through the fifth defendant and the property was then registered in its name. As a security for that loan the appellant agreed that the shares in the fifth defendant be transferred to the first defendant on trust until the full repayment of the loan. Once full payment was achieved, the shares in the fifth defendant would be transferred back to the nominees of the appellant. In the meanwhile the first defendant was prohibited from selling, disposing or transferring those entrusted shares at anytime to anyone or to any nominee; in a word he could do nothing with the shares except to hold and hand them over to the appellant when instructed.

[7] With control entrenched in the hands of the first defendant, once the shares were transferred to him even though on trust, sometime on 17 March 2005 he increased the number of shares from 2 to 100,000, with 99,998 shares for himself and the other two shares allotted each to the second and third defendants as nominees. Being nominees these two defendants were also appointed as directors of the fifth defendant. A further development was witnessed on 29 November 2005 when the first defendant (together with the second and third defendants), entered into a share sale and purchase agreement of the fifth

defendant's shares with the fourth defendant for an alleged sum of RM2,500,000. The effect was that the fourth defendant took over the running of the fifth defendant and by consequential progression, the property too.

[8] On 18 July 2008 the appellant realised something had gone awry when, after staying rent free on the property since 2003, and having paid taxes and assessments for it, received a notice for vacant possession from the fourth defendant ie, the new owner of the fifth defendant. This was followed by a trespass action against the appellant.

Case Filed By The Appellant

[9] On 14 October 2010 the appellant commenced an action against all the defendants (seven altogether). In a nutshell, the case of the appellant as pleaded was that it entrusted shares of the fifth defendant into the hands of the first defendant as security for a loan given by the latter, to buy a piece of property. That property was subsequently registered in the name of the fifth defendant. The first defendant unfortunately breached the trust when it transferred and registered the shares of the fifth defendant, which was enriched by the property, to the fourth defendant. The fourth defendant concluded the contract despite having knowledge of the trust. Exercising his rights, out of the 100,000 shares the fourth defendant allotted two shares, one each for the sixth and seventh defendants.

[10] The appellant pleaded that it wanted the return of the shares on the premise that the sale of the shares to the fourth defendant was void in light of him knowing that the first defendant held the shares in trust for the appellant. The prayers sought by the appellant also included a declaration that the 29 November 2005 share sale agreement was null and void, the share transfer certificate dated 12 November 2007 transferring shares of the first, second and third defendants in the fifth defendant to the fourth defendant as void for misrepresentation, and that following the cancellation of the share sale agreement of 29 November 2005 the shares registered in the names of the sixth and seventh defendants be transferred back in the names of the appellant's committee members.

What Transpired At The High Court

[11] The first defendant apart from not filing any appearance failed to appear in court to adduce evidence for the defendants despite being subpoenaed (and being consistent, has also shown no interest over this appeal). The second and third defendants in essence countered that they were mere nominees of the first defendant and were unaware of the appellant's rights. Their non-filing of any appeal at the Court of Appeal merely confirmed their lack of interest in the eventual outcome of the matter facing them.

[12] The 'collective respondents' countered that in 2003 the fourth defendant (DW1) had given a friendly loan of RM2,405,700 to the first defendant though was eventually paid up. In 2005, the first defendant asked the fourth defendant to buy the fifth defendant's shares, and after agreeing, bought the entire share capital of the company through a share sale and purchase agreement of 29 November 2005 for a sum of RM2,500,000. As far as the sixth and seventh defendants were concerned they were mere nominees of the fourth defendant, and together with the latter, knew nothing of the alleged trust at the time of the transaction. In a gist their position was that the fourth defendant was a *bona fide* purchaser when he bought over the fifth defendant's shares from the first defendant and his nominees.

Relevant Findings Of The Learned Judge

[13] The learned judge found that a trust was created when the appellant transferred the shares in the fifth defendant to the first defendant. He accepted the appellant's submission that the doctrine of constructive trust had been established in the circumstances of the case and therefore also applicable against the 'collective respondents'. His words in verbatim were as follows:

> I accept the submission of the plaintiff that the plaintiff has discharged the burden of proof on a balance of probabilities as to the existence of a trust *via* both documentary evidence as well as oral evidence and I accept the submission of the plaintiff that the doctrine of constructive trust will be applicable in the instant case to provide the relief as prayed against the fourth, sixth, and seventh defendants …

[14] From the above remarks the obvious conclusion is that a constructive trust came into existence when the first defendant unconscionably transferred the shares to the 'collective defendants'. The consequential effect was that as the 'collective

respondents' had notice of the trust and therefore could not qualify as *bona fide* purchasers of the shares of the fifth defendant, they likewise became constructive trustees. More of this later. On that premise, the learned judge allowed the relief as prayed against them.

[15] The learned judge arrived at the constructive trust finding, whether against the first defendant or the 'collective respondents', as he believed the appellant's witnesses. He found them to be credible witnesses. Further, with the case of *Bar Malaysia v. HF Vitality (Malaysia) Sdn Bhd* [2003] 1 CLJ 510 amongst others in mind, the learned judge considered the issue of trust or other issues as having been proved and admitted, in light of the first defendant's refusal to attend court; his non-appearance which left the appellant's witnesses evidence unrebutted strengthened the appellant's case.

Treatment Of Defence Witnesses

[16] The defence called four witnesses with the fourth and seventh defendants (DW1 and DW2 respectively) being the relevant ones. Unfortunately their evidence was not looked upon favourably by the learned judge. A cause for concern had arisen regarding the credibility of DW1 as the learned judge came across evidence of a complaint against him being involved in a disguised non-permissible money lending transaction with another group of people. He found the dismal information in an amendment application of the statement of claim, wherein it was divulged that a complaint was filed earlier with the Bar Council of his involvement in a similar kind of transaction, and applying the same *modus operandi* as the current case.

[17] Credibility apart, the 'collective respondents' defence failed to impress the learned judge in light of their uncorroborated testimony. The first defendant was a key player in the share sale and purchase agreement of 29 November 2005 and his failure to come to court left the fourth defendant's defence uncorroborated (and affected the rest of the 'collective respondents' defence). Had the first defendant been present and impressed upon the court of the fourth defendant's innocence pertaining to the existence of the trust, his defence could have been more tenable. In the end, even the fourth defendant's defence that he was a *bona fide* purchaser completely fell on his bare testimony adduced in the course of the trial; and as said above the learned judge disbelieved him.

[18] Bearing in mind RM2,500,000 was a huge consideration sum for the shares of the fifth defendant, with no payment receipts to confirm that share sale agreement, it was difficult for the learned judge to accept their evidence or defence at face value of that agreement being a genuine transaction, let alone the defence of being a *bona fide* purchaser. They could not suggest innocence of the relevancy of such documents, as pursuant to the filing of encl. 45, the 'collective respondents' were required to produce those documents. Unless the learned judge believed their oral testimony, that payment which was not backed by any corroborative evidence, would remain a bare assertion. The confirmation by the second and third defendants of the want of payment of their two subscribed shares by the fourth defendant merely strengthened the belief of the learned judge that no payment of the RM2.5 million was made, and the sale of the fifth defendant's shares was a sham transaction to disguise a loan. After testing the evidence of both the defence witnesses against the backdrop of the appellant's evidence it was no surprise that he found them as 'not witnesses of truth'.

[19] As reflected in the learned judge's grounds of judgment, he opined that, 'the real issue for determination, *inter alia*, appears to be whether the fourth defendant's purchase of shares of the fifth defendant was a *bona fide* transaction'. Having found the existence of a trust when the appellant transferred the shares of the fifth defendant to the first defendant, which transformed into a constructive trust when the latter unconscionably transferred them to the fourth defendant who had notice of that trust, the learned judge concluded that such a constructive trust was equally applicable against the 'collective respondents'. He then granted the consequential orders. The prayers for a declaration that the share and sale purchase agreement dated 29 November 2005 was null and void, that the shares that were registered in the names of the sixth and seventh defendants be transferred to the appellant's committee members, and the Assistant Registrar be given the authority to transfer the shares in the fifth defendant to the appellant's representatives were all granted.

[20] It was pursuant to the above finding and orders that the 'collective respondents' filed an appeal at the Court of Appeal. They were successful and the learned judge's orders were set aside. The first, second, and third defendants as said earlier filed no appeal. The Court of Appeal's finding of facts did not depart much from that of the learned judge except on certain substantive

matters. The Court of Appeal disagreed that an express trust existed in 2003 by way of transfer of the two shares in the fifth defendant to the first defendant when evidentially no such transfer took place, disagreed that an express trust existed in 2003 by way of transfer of the 99,998 shares in the fifth defendant when these shares were created only in 2005, and expressed its disagreement with the conclusion of the learned judge that the defendants' failure to call the first defendant absolved the appellant from proving its claim of the existence of the express trust, and disagreed with the learned judge for invoking an adverse inference arising from the appellant's failure to call one Lau Kean Fai.

The Path To Our Decision

[21] In a nutshell, the Court of Appeal had concluded that by reason of the learned judge having acted upon the wrong principles of law and upon a misapprehension of the evidence, the 'collective respondents' appeal was allowed. A myriad of reasons were supplied by the appellant to support its appeal, and to avoid confusion we have compressed the essence of the complaints under the following sub-headings.

The First Complaint

[22] This sub-heading begs the question whether it was the appellant's pleaded case that an express trust existed in 2003 in pursuance of the friendly loan. This issue was strenuously argued by the appellant as the Court of Appeal opined that the appellant's claim 'was that an express trust came into existence in 2003 as a result of the intention of the parties contained in the gentlemen's agreement of 2003.' To resolve this matter it necessitates a scrutiny of the statement of claim.

[23] The relevant plea in the statement of claim on this issue, if any would be found in paras. 21(iii) (c-f), 22(v), 25, 29-32, and 33(iii), (v) (vii), 45(ii) and 48. Having perused those paragraphs carefully and in fact the whole statement of claim, we found nothing printed on them to indicate that the appellant had pleaded 'express trust'. The statement of claim merely states 'trust'. As this is quite clear no further discussion is required.

The Second Complaint

[24] The appellant ventilated that the alleged finding of the first defendant being an express trustee of the 100,000 shares by the learned judge, was never part of the ground of appeal of the 'collective respondents' at the Court of Appeal stage (see ground 12 of the MOA). Thus the Court of Appeal should not have delved into something that was never appealed against. To resolve this issue we need to peruse the memorandum of appeal in order to arrive at that factual complaint. A perusal of the memorandum of appeal regarding the trust, pertained more to the dissatisfaction of want of evidence that the first, second, and third defendants "were holding the shares on trust for the respondent at the time when the share sale agreement was entered between the appellant (fourth defendant) and the first, second, and third defendants." Interestingly enough, even the 'collective respondents' conceded in ground 13 of the memorandum of appeal that they were found to be constructive trustees by the learned judge; and not trustees of an express trust. We could only conclude after a perusal of the memorandum of appeal that the Court of Appeal had indeed gone outside the four corners of the memorandum of appeal.

The Third Complaint

[25] Under this sub-heading the complaint is that the Court of Appeal had misdirected itself when it found, first, that the learned judge personally found, and secondly that he found an express trust in existence in 2003. This was followed by the conclusion of the Court of Appeal that 'no express trust could have come into existence in 2003' pertaining to the 100,000 shares of the fifth defendant. The latter view would not have caused much violent reaction and objection from the appellant, had it not been for the remark by the Court of Appeal that it was the learned judge who found the existence of such express trust. As an illustration, at p. 14 of the grounds of judgment, the Court of Appeal in succinct terms said:

> Once it is acknowledged that the subject matter of the trust was not even in existence in 2003 and created by way of an allotment then, with respect, the learned trial judge's finding that the first defendant was the express trustee of the entire 100,000 shares of the second appellant is clearly without foundation.

Again at p. 28 of the grounds of judgment the Court of Appeal wrote:

> In our opinion, the learned trial judge fell into error both in the application of legal principles, as well as in the judicial appreciation of the evidence. In summary, the errors committed by the learned judge included the following:
>
> a. finding the existence of the express trust in 2003 by way of transfer to the first defendant of the only two shares of the second appellant to the first defendant when no such transfer took place …

[26] With respect, we found nothing in the grounds of judgment of the learned trial judge which indicated that the learned judge ever made a finding of fact or law that the first defendant was the express trustee of the shares. The appellant ventilated that this erroneous finding had caused a miscarriage of justice when the Court of Appeal disregarded the actual finding of the learned judge.

[27] Before identifying the type of trust a need arises for us to arrive at a finding whether there actually was a trust in existence when the shares were transferred to the first defendant by the appellant. The answer is obvious. The second, third, and the 'collective respondents' at best could only say that they had no notice of the trust between the appellant and the first defendant but not to assert that no trust was in existence. As opposed to this, the court had before it positive and unrebutted evidence from the appellant of the existence of a trust. Unless this positive testimony, which went through the rigours of a trial is contradicted this failure to do so must mean that the appellant's evidence had been successfully established, or taken as admitted by the opposing party.

[28] By analogy, Gopal Sri Ram when evaluating an unrebutted affidavit in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 at p. 614; [1995] 1 MLJ 281 at p. 286 had this to say:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[29] In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381/398 the appellant had commenced proceedings to enforce a trust she claimed had arisen in her favour. The first respondent did not attend court, give evidence or take part in the case. The appeal was allowed and the orders of the High Court and Court of Appeal were set aside. On the issue of the effect of the non-presence of the first respondent in court, Gopal Sri Ram FCJ had remarked:

> In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true … In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.

[30] Without the evidence of the first defendant's denial of the trust's existence, leaving only the untouched appellant's evidence standing like a sore thumb, and without the need to invoke the adverse inference principle in light of the abundance of direct evidence, the learned judge was right in concluding that the first defendant was entrusted with those shares (*Berry v. British Transport Commission* [1961] 3 All ER 65/75). This trust issue thus must be construed as proved and established.

[31] A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes (*Principles of the Law of Trusts* by HAJ Ford and WA Lee). As distinct to a trust for a purpose, a beneficial owner may enforce it by a suit as in the current case. Equity, which was historically dispensed by the Chancery Court, and against his person (ie, *in personam*) now compels the trustee to administer the trust in accordance with his conscience, with even a possible sanction of imprisonment until he has made good the loss caused to the trust property. On the issue of restitution, Lord Denning MR in *Hussey v. Palmer* [1972] 3 All ER 744 had occasion to say at p. 747:

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust … By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on

A large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

[32] With the advent of new concepts and classes of trusts, it is rather difficult to draw the line between an express and a constructive trust, though a trust is still an express trust however ambiguous or clumsy the language has been used by the settlor subject to the court being satisfied that such a trust was intended. Such intention may be oral or written. Notwithstanding, an express trust which may be divided into a private trust and public or charitable trust, once the property is transferred to the trustee on trust for a third party or even the transferor, the trust is complete. For a brief but clearer picture, *Underhill's Law of Trusts and Trustees* (12th edn.) at p. 10 authored:

> Thus words of entreaty, prayer, or expectation (precatory words) may be held to create an express trust if, on the whole instrument the court considers that the person using them intended them to be imperative and binding …
>
> Illustrations
>
> …
>
> Express Trusts
>
> A, by his will, devises property to B, in trust for C; that is a direct express trust.
>
> A, by his will, gives property to B, in full confidence that he will apply it for the benefit of C and her children. If, on the whole will, the court thinks that the expression of confidence was intended to be imperative, a precatory trust, which is always an express trust, will be created.

[33] We now discuss the constructive trust. In *Gissing v. Gissing* [1970] 2 All ER 780 (790) Lord Diplock said:

> A resulting, implied or constructive trust-and it is unnecessary for present purposes to distinguish between these three classes of trust-is created by a transaction between the trustee and *cestui que* trust in connection with the acquisition by the trustee of a legal

estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que* trust a beneficial interest in the land acquired.

[34] In *Paragon Finance Plc v. DB Thakerar & Co* [1999] 1 All ER 400 Millet LJ said:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first of case (and this is the class with which we are presently concerned), however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of the trust. Well known examples of such a constructive trust are … (emphasis added)

[35] The court in *Takako Sakao v. Ng Pek Yuen & Anor (supra)* opined that:

> A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available....are (i) where there is a specifically enforceable contract for the sale of property (moveable or immoveable), the vendor holds the property on a constructive trust for the purchaser, … and where a gift made as *a donatio mortis causa* fails, the intended beneficiary of the gift holds it in trust of the donor … What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[36] Due to the fine line drawn between an express trust and a constructive trust, perhaps a comparison of these two classes of trusts may help give a clearer picture. An obvious difference is that an express trust comes into existence the moment the trust is expressed while for a constructive trust the unconscionable behaviour of the trustee ignites it into existence. Geraint Thomas Alastair Hudson in *"The Law of Trusts"* 2nd edn. wrote:

> One significant distinction between an express trust and a constructive trust is that an express trust necessarily comes into existence from the moment at which the settlor declared it, whereas a constructive trust cannot exist but for the

A unconscionable behavior of the defendant which brings it into existence; therefore the express trust is brought into existence by the deliberate act of the settler whereas a constructive trust is brought into existence by means of the wrongful act of the trustee. ... Thus, the constructive trust is dependent on the unconscionability of the defendant's actions ...

B

[37] From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it C unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into D existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.

[38] Perusing the facts of the current case, it was obvious that E the first defendant was instructed merely to hold on to the shares pending the full repayment of the loan, and was never granted the power of disposal by the appellant of those shares. Once payment was completed the shares were to be returned. From these simple facts it was obvious that at the initial stage only a bare trust F existed as the first defendant had no active duty to perform. The first defendant's duty was only to convey the shares back to the appellant ie, the beneficiary who was entitled to the entire equitable interest, when instructed to do so (*Christie v. Ovington* [1875] 1 Ch D 279; *Re Cunningham and Frayling* [1891] 2 Ch G 567; 9780 HAJ Ford; *The Law of Trust* by Geraint Thomas 2nd edn. p. 22).

[39] It was improbable that full repayment would not take place as gleaned from the facts. The appellant is an established political H body and was housed on that property. A sum of RM1.8 million had already been paid enforcing the certainty of the fulfillment of the appellant's obligation towards full repayment of the loan. The above instruction to hold it on trust and not to dispose of the shares were made crystal clear by the appellant to the first I defendant. It was obvious that factually and legally the appellant never abandoned its beneficial interest. Despite being bereft of any

beneficial right over the shares the first defendant still acted unconscionably when it transferred the shares to the fourth defendant. At that instance when the wrongful act was committed by the first defendant a constructive trust came into existence.

[40] Whether the learned judge was correct when he concluded that a constructive trust would be applicable against the 'collective respondents' would depend on whether they had knowledge of the trust. The fourth defendant had pleaded that he was a *bona fide* purchaser of the shares. Obviously if he fails in this defence then focus would shift to the prayers sought, in particular whether the shares in the hands of the 'collective respondents' could be returned to the appellant (*Malaysian Trust Law* by Mary George).

Was The Fourth Defendant A *Bona Fide* Purchaser

[41] Aside from the dearth of evidence of payment by the fourth defendant to the first, second, and third defendants for the fifth defendant's shares, we found several unanswered questions, amongst them being why did the transfer of shares forms record the consideration to be RM100,000 and not RM2,500,000, why was the purchase price less than the auctioned price of the property or the true value of the company (RM2,673,000 + RM100,000 (paid up capital), why the share transfer forms were dated 12 November 2007 despite the contract being executed on 29 November 2005, and why those documents were stamped only in December 2007? Could the depressed consideration sum and late execution date imply that the forms had been deliberately left empty and executed only on 12 November 2007 by the fourth defendant ie, when there was failure on the part of the first defendant to repay the loan? All the answers were within the knowledge of the 'collective respondents' but none were forthcoming.

[42] We likewise find the following findings of the learned judge safe and reasonable, and therefore agree with them:

[43] With the fifth defendant having no financial capacity to purchase and own the property, it was no surprise that the appellant took up a friendly loan from the first defendant. As regards to the buying of the fifth defendant's shares, we also found no evidence adduced by the 'collective respondents' to

show that monies had been paid to the first, second and third defendants for them. In fact there was corroboration of non-payment when the second and third defendants, who were directors of the fifth defendant, had evinced that they did not receive any money for the transfer of their shares to the fourth defendant. This non-payment was one of the disturbing factors that caused the learned judge to remark that the shares were being held by the first, second and third defendants on trust. We likewise find the conduct of the defendants inexcusable as they failed to produce the relevant documents in their possession despite being required to do so. The 'collective respondents' said they were *bona fide* purchasers but failed to prove it. As this was a matter peculiarly within their knowledge the onus was on them (*Pekan Nenas Industries Sdn Bhd v. Chang Chin Chuen & Ors* [1998] 1 CLJ 793/854). The non-payment of rents when occupying the property after the successful bid of 2003 and the regular payment of taxes and assessments of the property merely strengthened the claim of the appellant.

[44] From the above facts, questions were posed but left unanswered, want of evidence of payment, questionable documentary evidence, unrebutted evidence of the appellant, conduct of the parties etc. we have no hesitation in deciding that the fourth defendant was not a *bona fide* purchaser of the fifth defendant's shares from the first defendant.

Conclusion

[45] With such overwhelming evidence before us we are convinced that the shares of the fifth defendant had been transferred by the appellant in 2003 to the first defendant on trust. The latter being bereft of any title or interest could not transfer the shares to anyone. A constructive trust came into existence the moment the shares were transferred to the 'collective respondents'. As the latter had notice of the trusts they therefore assumed the role of constructive trustees. *Halsbury's Laws of England*, 4th edn., vol. 48 authored that "a stranger who receives property in circumstances where he has actual or constructive notice that is trust property being transferred to him in breach of trust will, however be also constructive trustee of that property."

[46] As the purchase of the shares were from the first defendant, how is the appellant to circumvent the privity of contract hurdle as the 'collective respondents' when purchasing the shares were far removed from the appellant? Again the answer is the enforcement of equity on the 'collective respondents' in light of them having notice of the creation of the trust. In *Westdeuthsche Landesbank Gironzentrale v. Islington London Borough Council* [1996] 2 All ER 961 Lord Brown Wilkinson observed:

> Once a trust is established, as from its date of establishment the beneficiary has, in equity, a proprietary interest in the trust property which propriety interest will be enforceable in equity against any subsequent holder of that property … other than the purchaser of value of the legal interest without notice.

[47] In the case of *Foskett v. McKeown & Anor* [2000] 3 All ER 97 at 122 f-h, Lord Millet observed as follows:

> ... The beneficiary's proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except that of a *bona fide* purchaser for value without notice of the breach of trust. The same rules apply even where there have been numerous successive transactions, so long as the tracing exercise is successful and no *bona fide* purchaser for value without notice has intervened.

[48] In *Tulk v. Moxhay* 1848 EWHC Ch J34 (22 December 1848), the plaintiff ie, Tulk being the owner of a vacant lot and some nearby houses in Leicester Square, sold that vacant lot to one Elm in 1808 conditional on that sold piece of land being used for certain specific purposes eg, as a garden or pleasure ground etc. The conditions of the contract (covenants) applied to Elm's heirs and assigns. The deed of that vacant lot passed many hands with the last being Moxhay. Therefore Moxhay never bought the vacant lot from Tulk. By the time he bought the land the deed said nothing of the covenant though admitting that he knew of the covenant and restrictions of the 1808 sale. Since he owned the land, and nothing was said in the deed about a pleasure garden, Moxhay decided to alter the character of the square garden. The plaintiff was not happy about that intention and successfully obtained an injunction from the Master of Rolls. The defendant

then filed a motion to discharge that injunctive order. The Lord Chancellor (Cottenham) without calling the plaintiff to reply refused the motion. He said:

> That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

[49] In *De Mattos v. Gibson* (1843-60) All ER Rep 803 Knight-Bruce LJ said:

> Where a man has acquired property, with a full knowledge of a previous existing contract, legally entered into, that that property should be used in a particular manner, the acquirer should not be allowed to apply or use the property otherwise than under the contract, or to the damage of the person with whom the earlier contract had been made … why should not a court of equity interfere to prevent a positive breach?

[50] *Lord Strathcona SS Co v. Dominion Coal Co.* [1926] AC 108 approved and applied the principle laid down by Knight Bruce LJ. With the enforcement of equity in mind the appropriate order in the circumstances of the case (as the shares are still with the 'collective respondents'), is their return to the appellant.

Questions For Our Determination

[51] For the reasons abovestated we would answer the questions posed as follows:

> Question 1 specifically mentioned ss. 67 and 68 of the Courts of Judicature Act 1964, provisions which give the Court of Appeal jurisdiction to hear and determine civil appeals. These provisions not only are substantive in one context but also procedural on the other, depending upon the context they are being used. Be that as it may when interpreting them the outcome should not result in unfairness or produce manifest injustice in particular relating to procedure (*Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491). In the instant case no

jurisdictional error was committed by the learned judge, which could justify the Court of Appeal to interfere or act to straighten things out. Further, in the course of the unnecessary interference of a part of the judgment that did not form part of the appeal, and due to a misreading of the grounds of judgment, the Court of Appeal had instead caused injustice to the appellant. In the circumstances of the case, the answer to the first question is in the negative. This ground by itself is sufficient for us to allow the appeal. Thus, there is no necessity to answer questions 2 and 3.

[52] Being unable to support the reasoning of the Court of Appeal we therefore unanimously allow the appeal with costs. The orders of the learned judge are reinstated.